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No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES AND SUPPORTING MEMORANDUM

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EXCEPTIONS OF THE UNITED STATES

The United States respectfully excepts to the final Report of the Special Master, in the following respects:

First, insofar as the Report recommends disallowance of mainstream diversion rights for the benefit of specified irrigable acreage of the Fort Mojave Indian Reservation on the ground that the lands in question have not finally been determined to lie within the Reservation boundaries;

Second, insofar as the recommended Decree provides for exclusion from entitlement to mainstream diversion rights of parcels within the boundaries of each Reservation which, after the establishment of

the Reservation, have been, or later may be, alienated to non-Indians;

Third, insofar as the recommended Decree fails explicitly to recognize the continuing force, as applied to all acreage to be awarded diversion rights, of the priority and unrestricted use provisions of the Decree entered by this Court on January 9, 1979; and,

Fourth, insofar as the recommended Decree fails to allocate among the three Lower Basin States the mainstream diversion rights recognized in favor of the five Indian Reservations.

REX E. LEE
Solicitor General

MAY 1982

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MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF EXCEPTIONS

STATEMENT

The clear and comprehensive Report of the Special Master speaks for itself and we shall not further burden the Court by attempting a detailed summary here. A very brief synopsis will suffice.

1. The present proceedings were initiated in early 1979 when the Court appointed a Special Master and referred to him Motions to Intervene by the Tribes of the five lower Colorado River Indian Reservations[1] and the Motion of the United States for Modi-

[1] The Tribes and their respective Reservations (proceeding from North to South along the lower Colorado River) are: (1) the Fort Mojave Indian Tribe of the Fort Mojave Reservation, (2) the Chemehuevi Indian Tribe of the Chemehuevi Reservation, (3) the Colorado River Indian Tribes of the Colorado River Reservation, (4) the Quechan Indian Tribe of the Fort Yuma Reservation, and (5) the Cocopah Indian Tribe of the Cocopah Reservation.

fication of the Decree entered March 9, 1964. 439 U.S. 419, 436; 440 U.S. 942. The burden of each of these motions was to pray for supplemental diversion rights from the mainstream of the Colorado River on behalf of each of the five Reservations, in addition to those decreed in 1964 (see 376 U.S. 340, 344-345). Two categories of claims were advanced: the first, in respect of "practicably irrigable" acreage within the then conceded boundaries of the Reservations for which no claim had been made in the earlier proceedings ("omitted lands"); the second, in respect of practicably irrigable acreage restored to the Reservations by more recent final administrative, judicial or congressional decisions which adjusted the Reservation boundaries ("boundary lands"). Although overlapping in large part, the claims advanced by the Tribes, except in one instance (for the Cocopah Reservation), exceeded those asserted by the United States. See Report 21-22, 29, 106-110.

The States of Arizona, California and Nevada, together with four California Irrigation Districts and three municipalities in that State (referred to compendiously as "the State Parties"), opposed these claims. The "omitted land" claims were said to be foreclosed by the entry of the 1964 Decree; the "boundary land" claims—or most of them—were argued to be premature, because allegedly no "final determination," binding on the State Parties, of the extended boundaries had been made. Finally, the State Parties contested the right of the Tribes to intervene and appear by their own counsel, at least if the United States remained their active, but separate, champion. See Report 5, 22-25 and n.56.

2. In August, 1979, after briefing an oral argument, the Special Master decided a number of prelim-

inary questions. Memorandum and Report on Preliminary Issues.[2] He ruled that the Tribes should be allowed to intervene (*id.* at 5, 6-30), that the expanded Reservation boundaries were "finally determined" for present purposes (*id.* at 5, 31-41), and that evidence should be heard on the "omitted land" claims, albeit a final decision on the admissibility of those claims was deferred (*id.* at 5, 41). See final Report 25-28.

When the Master filed his Report on these preliminary issues, the State Parties sought leave to file exceptions. We opposed that course and the Court denied the motion. 444 U.S. 1009 (Jan. 1980). Thereafter, an extensive trial began before the Special Master, and continued at a number of adjourned sessions until April 7, 1981. Report 6-7. Full briefing followed and the Special Master submitted his final Report (dated February 22, 1982) to the Court in mid-March, 1982.

3. In his Report, the Special Master re-affirms his earlier rulings with respect to intervention by the Tribes (Report 26-27) and the finality of the boundary determinations (*id.* at 55-76). And he definitively rejects the State Parties' objection to the "omitted land" claims as foreclosed by the 1964 De-

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[2] This preliminary Report, dated August 28, 1979, is to be distinguished from the final Report dated February 22, 1982. Except as otherwise indicated, all citations to "Report" refer to the latter. The earlier preliminary Report, originally filed in typewritten form, is being printed under the supervision of the Special Master and will be submitted by him to the Court in due course. Because the printed document is not yet available, we cite here to the typewritten preliminary Report.

cree. *Id.* at 29-55. The Master then defines the general standards which he has followed. *Id.* at 88-105. And he goes on to consider in detail the several parcels alleged by the United States (*id.* at 125-196) and by the Tribes (*id.* at 197-277) to qualify for mainstream diversion rights as "practicably irrigable" acreage. Most of the claims advanced by the United States are sustained (*id.* at 113-117, 192-196), as well as a substantial number of the additional tribal claims (*id.* 117-121, 254, 263-267, 272-274, 276-277). Finally, the Report includes a recommended Decree in the form of an amendment to Article II(D) of the 1964 Decree. *Id.* at 281-283.

ARGUMENT

We endorse all the principal recommendations of the Special Master's final Report. And, with the exceptions hereafter noted, we acquiesce in those rulings that went against the United States. Indeed, our Exceptions relate only to certain points of amendment to the recommended Decree. In one instance, we pray for correction of what appears to be inadvertent error on a matter not in dispute; and otherwise, we suggest revisions or additional provisions which merely carry out the Master's findings and conclusions more explicitly. In each case, we have no reason to anticipate disagreement from the other parties.

The present memorandum is confined to supporting our own very limited Exceptions. Our submission on the larger, more controversial issues, must await the Exceptions which we presume will be filed by the State Parties. They will be discussed in our reply brief.

FIRST EXCEPTION: BOUNDARY LANDS IN THE "CHECKERBOARD AREA" OF THE FORT MOJAVE INDIAN RESERVATION DISALLOWED AS NOT FINALLY DETERMINED TO BE WITHIN THE RESERVATION

1. In the case of the Fort Mojave Reservation, the Special Master disallowed the claims of the United States for specified irrigable acreage solely on the ground that the areas in question, not treated as within Reservation boundaries in the prior proceedings, were not shown to have been subsequently determined to be Reservation lands by any formal or final action of the Department of the Interior. Report 76-85. The Master concluded that the equivocal "state of the record" before him did not "present a sufficient basis for an award of water rights with respect to these disputed parcels." *Id.* at 77. On the other hand, the Master made findings as to the practicably irrigable character of the disputed acreage (*id.* at 113-115 and n.13, 192-193), and he suggested that "[i]f the areas are later determined to be within the Reservation," those "findings as they apply to these lands may be reinstated at that time." *Id.* at 85.

For one area, the anticipated contingency is almost certain to occur well before this Court considers the case. We refer to U.S. Units FM-11, FM-12 and FM-13, accreted acreage in the so-called "checkerboard area" comprising some 641 gross irrigable acres. See Report 81-83, 192-193.[8] The fact is that

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[8] In accordance with the Special Master's conclusion that some 72 gross acres in Unit FM-12 were awarded diversion rights in the prior proceedings (Report 82 n.131), we have deducted this acreage. So, also, we have not included some 17 acres of Unit FM-11 that lie within the La Follette Tract or the 160 acres of tract D of Unit FM-13, a parcel of "omitted land" for which diversion rights were allowed by the Master.

survey work already undertaken shows those parcels to constitute accretion to Reservation lands and it only remains to complete those surveys and formally to recognize the consequent shift in Reservation boundaries as including these parcels. In normal course, that will happen in the ensuing ninety days. And, once this is done, the Reservation status of the disputed acreage will be "finally determined" for present purposes—no less than in respect of the other "boundary lands" for which diversion rights are proposed to be adjudicated by the Special Master's recommended Decree. See Report 55-76.

2. It is, of course, regrettable that this determination was not formalized before the Special Master issued his Report, and, indeed, is not yet complete. Yet, it is plain that when final approval of the surveys is entered, the lands will qualify for water allocations under the Master's ruling and that no further proceedings before the Master are required. In these circumstances, we deem it appropriate to ask the Court itself to notice the effect of the final administrative determination when it occurs.

We have no reason to suppose that the State parties will object to this procedure. Although they may continue to assert that *none* of the "boundary adjustments" are sufficiently final, we assume they will not single out this determination as less so than the others. At least in the absence of serious objection, it would be pointless to make a new reference to the Special Master, entailing further delay and requiring this Court ultimately to consider and enter still another amended decree.

We stress that, in this respect, we have no quarrel with the Special Master's conclusion. Indeed, his recommended Decree requires that diversion rights

be adjusted whenever subsequent boundary corrections are made by final and formal administrative determinations. Report 282. Nevertheless, the upshot is that the Decree we submit will diverge from the one recommended in the Report by presently including these disputed parcels as irrigable Reservation lands and assigning to them present diversion rights. Accordingly, we have labeled our submission on this point an "exception."

3. The net effect of sustaining this Exception would be to add 609 net acres in Arizona to the irrigable acreage of the Fort Mojave Indian Reservation entitled to mainstream diversion rights (641 gross acres x .95) and to increase the mainstream diversion rights of the Reservation by 3,934 acre-feet (609 net acres x 6.46). Accordingly, the respective figures in Paragraph II(D)(5) of the amended Decree should be 162,862 (instead of 158,928) acre-feet and 25,199 (instead of 24,590) acres. See Report 282.

SECOND EXCEPTION: FUTURE EXCLUSION FROM ENTITLEMENT TO DIVERSION RIGHTS OF RESERVATION LANDS ALIENATED TO NON-INDIANS SINCE ESTABLISHMENT OF THE RESERVATION

1. In the proceedings before Special Master Rifkind a question arose whether certain acreage within the exterior boundaries of the Fort Mojave Reservation for which the United States claimed water rights should be excluded because the lands allegedly were owned by non-Indians who traced their title to grants to the State of California or to a railroad before the establishment of the Reservation. Instead of resolving the issue, the Court included a proviso in Article II(D)(5) of its Decree, 376 U.S. 340, 345.

When a like question arose in the present proceedings, the United States proposed that it be dealt with in the same way. Motion of the United States for Modification of Decree and Supporting Memorandum (Dec. 1978) 14-17, 33. The Special Master indicated his agreement (Memorandum and Report on Preliminary Issues 40; see, also, final Report 75), and the parties did not debate the matter further. However, the Master's recommended Decree contains a much more wide-ranging provision excluding from entitlement to Reservation diversion rights any lands which are ultimately determined to "have been or are later conveyed or patented to non-Indians." Report 282. That broad exclusion was suggested by none of the parties and is perhaps based on a misreading of our submission, which encompassed only non-Indian lands alienated *before* the Reservation was created. At all events, we view the proviso, in its recommended form, as erroneous and take exception to its inclusion in the Court's Decree.

2. Once again, we have no reason to believe the State Parties disagree with our position on this matter. But, however that may be, we deem it important to seek modification of the proviso. In light of the 1964 Decree, we do not now contest that lands previously alienated under the Swamp Land Act of 1850, ch. 84, 9 Stat. 519, or the Southern Pacific Railroad Grant Act of 1866, ch. 278, 14 Stat. 292, which have remained in non-Indian ownership should be treated as excluded from a later established Indian Reservation. It does not follow, however, that parcels of Reservation acreage that fell into non-Indian ownership thereafter, or are at the some future time alienated to non-Indians, should also be excluded. On the contrary, the law is well settled the other way. See 18 U.S.C. 1151; *Seymour* v. *Superin-*

tendent, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481, 497, 504-505 (1973); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 477-479 (1976).

To be sure, there has been some question whether irrigable acreage, although jurisdictionally remaining part of the Reservation, may share in tribal reserved water after it is transferred to non-Indian ownership. Yet, the outstanding decisions give, or indicate, an affirmative answer. See *United States* v. *Powers*, 305 U.S. 527 (1939); *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, Nos. 81-321 and 81-421 (Nov. 30, 1981); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957). At a minimum, it has generally been supposed that reserved water rights appertaining to Reservation lands may be transferred to a non-Indian purchaser to the extent the Indian seller had actually exercised his rights or the purchaser does so with reasonable dispatch. See *United States* v. *Hibner*, 27 F.2d 909 (D. Idaho 1928). But, whatever the ultimate resolution of this difficult question, it ought not be foreclosed by a casual provision in the Decree here.

3. If the present Exception is sustained, the last paragraph of the Decree recommended by the Special Master (Report 282-283) should be revised. For the sake of clarity and consistency, we suggest combining the two provisos included in the Master's proposed Decree into a single provision reading as follows:

> Provided that the number of practicably irrigable acres and the quantities of mainstream diversions specified in the foregoing paragraphs (1) through (5) shall be subject to appropriate upward or downward adjustment by agreement

or decree of this Court, in the event that the boundaries of any of the five Reservations are subsequently determined to include more or less lands than is presently determined or that lands presently included as entitled to Reservation diversion rights are subsequently determined not to be so entitled; such adjustment in the quantities of mainstream diversions shall be made by applying the appropriate unit diversion requirements listed in the Decree entered January 9, 1979 (439 U.S. at 422) to the number of net practicably irrigable acres within the lands subsequently determined to have been erroneously excluded or included.

THIRD EXCEPTION: PROPOSED ADDITIONAL DECREE PROVISIONS TO IMPLEMENT AND CONFORM THE 1979 SUPPLEMENTAL DECREE

1. In 1979, on the joint motion of the United States and the State Parties, the Court entered a supplemental decree in this case. 439 U.S. 419. The primary purpose of that decree was to particularize the "present perfected rights" to mainstream diversions in each of the three Lower Basin States, as had been contemplated by Article VI of the original Decree. See 376 U.S. at 351-352. With respect to such rights appertaining to the five Indian Reservations, however, there were three special provisions of substantial importance:

(a) The quantification of Reservation diversion rights was specified without prejudice to any additional entitlement that might result from boundary adjustments or from "omitted land" claims under Article IX of the 1964 Decree (Introductory paras. (2), (3) and (5), 439 U.S. at 421-422);

(b) All diversion rights of the Indian Reservations, whether presently quantified or later recognized, were accorded a first priority in time of shortage, regardless of priority dates, over all other rights to mainstream water in the three Lower Basin States except only certain specified "Miscellaneous Present Perfected Rights" (Introductory para. (5), 439 U.S. at 421-423); and

(c) It was expressly provided that the quantities of water now or later adjudicated for the benefit of each Indian Reservation, although calculated on the basis of irrigable acreage, need not be used for "irrigation or other agricultural application" (Introductory para. (5), 439 U.S. at 422-423).

The first of these provisions will have been given effect by the entry of the recommended Decree, subject to any future boundary adjustment, as the proposed Decree specifies. However, the Decree recommended by the Special Master makes no mention of the provisions summarized in paragraphs (b) and (c) above. We believe it is appropriate expressly to continue in effect those special provisions of the 1979 Decree. Plainly, the Master intended that result (see Report 104-105, 117, 121), and no party has suggested otherwise.

2. To this end, we suggest the following additions to the Decree recommended by the Special Master (Report 281-283):

(a) After the words 'ORDERED, ADJUDGED AND DECREED," substitute a colon for "THAT," begin a new paragraph labelled

"A", and continue as the Special Master has provided (with the revisions suggested in our First and Second Exceptions);

(b) Thereafter, add the following two paragraphs:

B. The provisions of Introductory Paragraphs (1) through (5) of the Decree entered herein January 9, 1979 (439 U.S. 419, 421-423), including the provision requiring first satisfaction in full in time of shortage of all Indian Reservation diversion rights regardless of priority dates except specified "Miscellaneous Present Perfected Rights" enjoying earlier priority dates, and the provision permitting usage of Reservation diversion rights for beneficial uses other than irrigation or other agricultural uses, shall remain in full force and effect and shall apply to all mainstream diversion rights adjudicated in favor of the five named Indian Reservations by the Decree of March 9, 1964, the Decree of January 9, 1979, the present Decree, and any supplemental Decree herein.

C. The quantities of mainstream diversion rights in favor of the said Indian Reservations specified in Paragraphs I(A), II(A) and III(A) of the Decree of January 9, 1979, shall be deemed amended in accordance with the present Decree.[4]

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[4] For the sake of clarity, we include as an Appendix the complete revised Decree we urge the Court to enter.

FOURTH EXCEPTION: ALLOCATION AMONG THE THREE LOWER BASIN STATES OF THE MAINSTREAM DIVERSION RIGHTS RECOGNIZED IN FAVOR OF THE FIVE INDIAN RESERVATIONS

One final "housekeeping" detail deserves mention. For lack of sufficient data in the record, the Special Master did not specify either (a) the respective number of Reservation irrigable acres located in each of the three States for which diversion rights are recognized, or (b) the priority dates for particular acreage where the Reservation was established by more than one instrument. See Report 105 n.3, 116-117 n.20, 121 n.37. As the Master explains (*id.* at 104-105), the second point is of no practical importance in light of the 1979 Decree which subordinates all mainstream diversion rights, except only minor "miscellaneous perfected rights," to those adjudicated in favor of the five Indian Reservations. On the other hand, the allocation of acreage—and appurtenant water rights—among the three States remains relevant. See 1964 Decree, Article II(B)(4) and Proviso following Article II(D)(9), 376 U.S. at 343, 346.

On this matter, however, it is anticipated that the parties will be able to agree. Accordingly, in due course, we shall submit to the Court a proposed additional provision quantifying the Reservation diversion rights which should be charged against each of the Lower Basin States.[5]

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[5] The text of such a provision, lacking most of the appropriate figures, is included as Paragraph (D) of our proposed Decree. Appendix, *infra*.

CONCLUSION

The Exceptions of the United States should be sustained and, in all other respects, the recommendations of the Special Master should be approved and the proposed Decree entered by the Court.

Respectfully submitted.

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MAY 1982

APPENDIX

Decree Proposed by the United States

It is ORDERED, ADJUDGED AND DECREED:

A. Article II(D)(1)-(5) of the Decree in this case entered on March 9, 1964, is hereby amended to read as follows:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 21,017 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 3,521 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 10,197 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,601 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 27, 1917, for lands reserved by the Executive Order of said date; June 24, 1974, for lands reserved by the Act of June 24, 1974 (88 Stat. 266, 269);

(3) The Fort Yuma Indian Reservation in annual quantities not to exceed (i) 130,135 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 19,515 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 902,207

acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 135,333 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 162,862 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 25,199 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date;

Provided that the number of practicably irrigable acres and the quantities of mainstream diversions specified in the foregoing paragraphs (1) through (5) shall be subject to appropriate upward or downward adjustment by agreement or decree of this Court, in the event that the boundaries of any of the five Reservations are subsequently determined to include more or less lands than is presently determined or that lands presently included as entitled to Reservation di-

version rights are subsequently determined not to be so entitled; such adjustment in the quantities of mainstream diversions shall be made by applying the appropriate unit diversion requirements listed in the Decree entered January 9, 1979 (439 U.S. at 422) to the number of net practicably irrigable acres within the lands subsequently determined to have been erroneously excluded or included.

B. The provisions of Introductory Paragraphs (1) through (5) of the Decree entered herein January 9, 1979 (439 U.S. 419, 421-423), including the provision requiring first satisfaction in full in time of shortage of all Indian Reservation diversion rights regardless of priority dates except specified "Miscellaneous Present Perfected Rights" enjoying earlier priority dates, and the provision permitting usage of Reservation diversion rights for beneficial uses other than irrigation or other agricultural uses shall remain in full force and effect and shall apply to all mainstream diversion rights adjudicated in favor of the five named Indian Reservations by the Decree of March 9, 1964, the Decree of January 9, 1979, the present Decree, and any supplemental Decree herein.

C. The quantities of mainstream diversion rights in favor of the said Indian Reservations specified in Paragraphs I(A), II(A) and III(A) of the Decree of January 9, 1979, shall be deemed amended in accordance with the present Decree.

D. The mainstream diversion rights in favor of the said Indian Reservations specified in Paragraphs I(A), II(A) and III(A) of the Decree of January 9, 1979, to the extent con-

sumptively used, shall be charged against the apportionment of the States of Arizona, California, or Nevada, as there indicated. Additional mainstream diversion rights of the said Reservations recognized by the present Decree, to the extent consumptively used, shall be charged as follows:

(1) Against the State of Arizona:

——* acre-feet for the Fort Mojave Reservation

——* acre-feet for the Colorado River Reservation

——* acre-feet for the Fort Yuma Reservation

7,453 acre-feet for the Cocopah Reservation

(2) Against the State of California:

——* acre-feet for the Fort Mojave Reservation

9,677 acre-feet for the Chemehuevi Reservation

——* acre-feet for the Colorado River Reservation

——* acre-feet for the Fort Yuma Reservation

(3) Against the State of Nevada:

——* acre-feet for the Fort Mojave Reservation

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* Figures to be supplied in due course.

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